



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HIGH COURT CRIMINAL APPEAL NO. 9 OF 2017

JEFWA MWERI BAYA..... 1ST APPELLANT

PATRICK KESI 2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the Judgment of Hon. L.N. Juma (Mrs), Resident Magistrate, delivered on 27th March, 2017 in Kilifi Senior Principal Magistrate's Court Criminal Case No. 407 of 2013).

JUDGMENT

1. The appeal herein arises from a conviction for the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on the 11th day of May, 2013 at Madamani village in Vitengeni location within Kilifi Country, the appellants jointly assaulted Joseph Sulubu Mweri thereby occasioning him actual bodily harm.

2. The Hon. Magistrate found the appellants guilty as charged and convicted them accordingly. They were sentenced to serve 3 years imprisonment. The appellants being dissatisfied with the conviction and sentence filed separate petitions of appeal on 10th April, 2017.

3. On 22nd January, 2018 the appellants amended their grounds of appeal with leave of the court. The 1st appellant, Jefwa Mweri Baya's and the 2nd appellant, Patrick Kesi Kafadzi's grounds of appeal are similar. They are to the effect that:-

- (i) The Learned Magistrate did not consider that PW1 was not a straight forward witness thus was unreliable;
- (ii) The Learned Trial Magistrate failed to see that the identification evidence tendered in court was worthless;
- (iii) The Learned Trial Magistrate erred in law and fact by connecting them to the instant matter without notice that the same was made up thus occasioning a miscarriage of justice;
- (iv) The Learned trial Magistrate erred in law and fact by not considering that the victim's evidence was not supported by any reasonable evidence;
- (v) The Leaned Trial Magistrate did not see that the matter in question was not proved to the required standard of law; and
- (vi) The Learned Trial Magistrate failed to consider their defence.

4. The appellants also filed submissions that are similar. They state that the Hon. Magistrate believed that it was the appellants who accosted and assaulted PW1 yet he said in his evidence that he could not tell what hit him as it was at night. It was suggested by the appellants that the fact that PW1 said that they never used to greet him shows there was a certain dispute between the family members thus they were implicated by PW1.

5. It was submitted that PW1 was not a credible witness. The appellants referred to the case of **Ndungu Kimanyi vs Republic**, 1979 KLR 282 where it was held that a witness upon whose evidence the court is to rely on should not create some impression that he or she is not a straight forward person. The appellants stated that if PW1 knew them, then it should not have taken time for them to be arrested. It was submitted that since the offence occurred at night, the circumstances were not ideal for positive identification. Further the appellants stated that no inquiry was made as to the nature and quality of light that emanated from the torch and the position of the torch relevant to the

appellants.

6. It was argued by the appellants that PW1 did not disclose the identity of his attackers in his first report. They cited the case of **Tekerali and Others vs Republic** (1952) EACA, to assert the importance of a first report. They challenged the evidence of PW4 who testified on behalf of the Investigating Officer.

7. The Office of the Director of Public Prosecutions filed submissions through Ms. Alice Mathangani, Senior Prosecution Counsel on 19th January, 2018. However, having taken into account that the said submissions were filed before the appellants had filed their amended grounds of appeal and written submissions, this court gave the Prosecution Counsel time to orally respond to the same.

8. Mr. Monda, Senior Assistant Director of Public Prosecutions who attended court for the hearing of this appeal submitted that the evidence on record shows that identification was by way of recognition as the conditions prevailing at the time the offence was committed were favourable for positive identification.

9. Counsel submitted that in his evidence PW1 indicated that he had a torch but when the appellants went in, the torch fell down but he knew the 1st appellant as his step-brother and the 2nd appellant as his nephew. He further said that the two moved out of the neighbourhood after they attacked him. Counsel therefore asserted that the issue of mistaken identity did not arise.

10. It was also submitted that the Hon. Magistrate found the evidence by the prosecution firm, thus the witnesses were credible. She found that the appellants committed the offence they were charged with.

11. Counsel argued that the Hon. Magistrate considered the defence of the 1st appellant and found it untruthful. She therefore dismissed it. She also considered the 2nd appellant's defence and found it untruthful in light of the prosecution evidence. Mr. Monda withdrew the notice of cross-appeal filed on 19th January, 2018.

THE EVIDENCE TENDERED BEFORE THE LOWER COURT

The duty of the first appellate court is to analyze and re-examine the evidence tendered before the lower court and come to its own conclusion, bearing in mind that it neither saw nor heard the witnesses testify. In **Okeno vs Republic**, [1972] EA 32 it was held that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

12. The victim, Joseph Sulubi Meri testified as PW1. He informed the trial court that he was a businessman at Matano Manne where he runs a shop. On 11th March, 2013 he closed his shop at night and went home. He found his child was not feeling well and he went back to the shop to collect medicine. It was his evidence that he got into the shop through a back door which he closed. As he was getting out, 2 men went in. He stated that the 2nd appellant held his throat and the 1st appellant was behind. PW1 struggled with them and they pulled him down and hit him on the back side of the head. He could not tell what hit him as it was at night.

13. He gave evidence that his child who was sick is mad and went towards the shop. The appellants ran away when they heard the noise as PW1's child approached the shop. He stated that when the appellants left, he gained his consciousness and screamed. People went to his aid. At that time he was bleeding on his head. He was taken to hospital where he fainted for some hours. He was then treated. His treatment notes from Vitengeni Health Center were marked as MFI-1. He later reported the incident to Kilifi Police Station where he was told to go to see a Doctor for a P3 form. He stated that the said P3 form dated 17th September, 2013 was filled after 2 or 3 weeks. He thereafter investigated and looked for the appellants.

14. PW1 testified that he saw the appellants as when they went in, he shone a torch he had on their faces. He identified them before the torch fell down. He stated that he knew the 2nd appellant as his nephew and the 1st appellant as his stepbrother. He indicated that as at the time of the incident the appellants used to stay at the same place with PW1 but they moved out after the incident. He further testified that the appellants were found by Village Elders. He could not tell the reason as to why they assaulted him. He added that they never used to greet him.

15. PW2 was Lynet Kate Sulubu, PW1's daughter. She testified that on 11th May, 2013 at 8:30 p.m., she was at home in Sabasaba. She stated that her sister was not feeling well and her father (PW1) went to the shop to buy medicine for her. She indicated that her sister walked towards the direction her father had taken. She then heard someone saying “nauliwa” and they could make out that the voice was coming from her father's shop. She recounted that her sister who is mentally challenged was shouting and that they saw the appellants herein come out from the shop. She indicated that she identified them as she knew them for they are related. She stated that it was dark but not too dark and she was able to see the appellants well.

16. She further testified that the shop where PW1 was and where they were was not too far. They screamed and people went to help PW1 who was bleeding profusely from his head. PW1 was taken out (of the shop) and washed. She recalled that his hand had been injured and he had injuries on his head. He was taken to Vitengeni Hospital where he was treated and discharged. He was taken to Kilifi District Hospital after 2 days where he was referred to Mombasa.

17. Dr. Nooreni Abduwalib testified as PW3. He produced the P3 form for PW1 as P. exhibit 2. It was filled by Dr. Deche who was no longer working at Kilifi District Hospital. The P3 form indicated that PW1 had a dent on his head and blood stained clothes. The writings on the said P3 form were to the effect that the victim (PW1) was assaulted by two people on 11th May, 2013, that he knew. He was treated at Vitengeni first and later taken to Kilifi District Hospital for further treatment where an Xray was done. PW3 further testified that the Doctor at Vitengeni stated that PW1 was bleeding from the head and had a big scar. He was given a tetanus injection, antibiotics and he was stitched. PW3 produced PW1's treatment notes as P. exhibit 1(a) and the Xray report from Jocham was produced as P. exhibit 1(b).

18. PW4 was No. 102187, PC woman Jackline Akinyi attached to Kilifi Police Station. She stated that on 20th October, 2015 she was given a file by PC Abdalla and that a report recorded by him shows that on 11th May, 2015 at 8:30 p.m. when PW1 was closing his shop, he was accosted by the appellants who ran away when PW2 went to the scene. PW1 was injured, he was taken to hospital and treated. He then reported to the Police and recorded a statement. The appellants were therefore arrested. PW4 indicated that PW1 was able to identify the assailant who hit him.

19. The 1st appellant gave an unsworn defence stating that PW1 was his elder brother. He further said that they heard noise, went to the shop and found that he had been beaten. The 1st appellant further indicated that at the hospital, PW1 said he did not know who beat him and that PW2 was not present at the scene of the incident.

20. The 2nd appellant, gave an unsworn statement stating that the evidence of PW2 was not credible. He said that PW1 was his father and that they do not talk. He denied having assaulted PW1.

DETERMINATION

21. The issues for determination are:-

(i) If the circumstances were ideal for positive identification; and

(ii) If the appellants assaulted PW1.

22. The evidence of PW1 is straight forward. He closed his shop at 8:30 p.m, went home but found one of his children who is mentally challenged was sick. He went back to the shop to collect medicine for her. It was while at the shop that 2 men went in and assaulted him. It was his evidence that he had a torch which he shone on their faces and he identified them before the torch fell down. He described the 1st appellant as his step-brother and the 2nd appellant as his nephew. PW1 and the two used to reside in the same place. It was his evidence that he was assaulted by the appellants and had to be treated for the injuries he sustained. The evidence of PW4 was to the effect that PC Abdalla recorded in the report he wrote that PW1 was able to identify the assailant who hit him.

23. PW2, who was PW1's daughter said that she saw the appellants running out of PW1's shop as he shouted for help. She said that it was dark but not too dark. She however did not disclose the source of the light that enabled her to see and identify the appellants. I therefore find that her evidence should not have been relied upon by the Hon. Magistrate as the basis of corroboration of PW1's evidence.

24. On the issue of the conditions prevailing at the time of identification, the Court of Appeal in **Wamunga vs Republic** [1989] KLR 424, stated thus:-

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

25. As regards the prevailing conditions at the time the offence was committed, PW1 was able to identify the appellants using torch light. Although the intensity of the light was not disclosed, it is apparent that PW1 was using the said torch to find his way around the shop. PW1 in his evidence stated that he shone the torch on the faces of the appellants before it fell down. In my considered analysis of his evidence, the issue of mistaken identity does not arise as the identification of the appellants by PW1 was by way of recognition. The appellants were his relatives whom he knew before the incident. It is my finding that the conditions prevailing at the time PW1 was assaulted were conducive for positive identification.

26. The Court of Appeal in the case of **Peter Musau vs Republic** [2008] KLR stated the following with regard to the issue of identification by recognition:-

"We do agree for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification by a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or someone within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence, can recall very well having seen him before the incident in question."

27. Although PW1 in cross-examination agreed that he had a land dispute with the 1st appellant, cross-examination revealed that PW1 had at one time reported the 1st appellant to the District Officer (DO) when he wanted to sell a piece of land that PW1 had given him. In cross-examination, PW1 asserted that he saw the appellants entering the shop. The P3 form on page 1 shows that PW1 reported to Kilifi Police Station as having been attacked by persons known to him. The P3 form shows that PW1 was sent to Kilifi District Hospital on 17th September, 2013, the Doctor found that PW1 had deep cuts on the scalp. The degree of injuries was classified as harm.

28. PW3 indicated in cross-examination that PW1 said he did not know his assailants, this court notes that the said Doctor is not the one who examined PW1 at the time of filling the P3 form and therefore had no contact whatsoever with PW1. Secondly the P3 form on page 1 shows that PW1 was assaulted by persons known to him. The appellants cannot therefore derive any benefit from that discrepancy in the evidence of PW3. I therefore find the submissions by the appellants that they were not properly identified to be without merit.

29. On the issue of whether PW1 was assaulted, he said that he was hit on the back side of the head when he was attacked. His daughter, PW2, found him bleeding from his head. On examination in hospital, he was found to have a dent and cut on his head. The cut was stitched. He was treated at Vitengeni Health Centre and Kilifi District Hospital. PW3 produced PW1's P3 form, treatment notes and Xray report. There is no doubt whatsoever that PW1 was assaulted.

30. I also find the act of the appellants disappearing from their usual place of residence until the time of their arrest, as evidence of their culpability in the commission of the offence.

31. The Hon. Magistrate considered the evidence tendered by both the prosecution and the appellants and found the evidence against them overwhelming. Save for the evidence of PW2 which I have held should have been rejected in so far as the identity of the appellants is concerned, there was no other shortcoming in the Judgment delivered by the lower court. The appellants were convicted for the offence of causing actual bodily harm and were sentenced to serve 3 years imprisonment. The maximum sentence under Section 251 of the Penal Code is 5 years imprisonment.

32. In the circumstances of this case and going by the injuries inflicted by the appellants on PW1, I find that the sentence imposed was proper. I therefore dismiss the appeal in its entirety.

DELIVERED, DATED and SIGNED at MALINDI on this 3rd day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

..... for the appellant

.....for the respondent

..... - Court Assistant